

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HELEN KAY AYERS
Claimant

VS.

HALLMARK CARDS, INC.
Respondent
Self-Insured

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Docket Nos. 247,852;
259,740

ORDER

Claimant appealed the May 13, 2002 Award entered by then Administrative Law Judge (ALJ) Julie A. N. Sample. The Appeals Board (Board) heard oral argument on November 20, 2002. Stacy Parkinson and Jeff Cooper were appointed Appeals Board Members Pro Tem and participated in the determination of this appeal in place of Board Members David Shufelt and Julie Sample, respectively, who recused themselves from this proceeding.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award.

ISSUES

This appeal involves two docketed claims that were consolidated by the ALJ for trial and award purposes. Both involved a series of repetitive trauma injuries. Docket No. 247,852 involves a series ending September 10, 1998. Claimant was subsequently taken off work for treatment of her injuries, including surgeries. Claimant initially returned to light duty work until April 5, 1999, when she was released and returned to full duty. In Docket

No. 259,740, claimant alleges a second series of repetitive trauma injuries beginning April 5, 1999 until July 14, 2000, which is the date she last worked for respondent.

Respondent admits claimant suffered personal injury by accident in Docket No. 247, 852. Respondent further agrees with the six percent impairment of function as found by the ALJ and that claimant is entitled to a six percent permanent partial disability award calculated from the September 10, 1998 date of accident. Except as to the claimant's average weekly wage and thus, the compensation rate, claimant does not dispute the ALJ's findings and conclusions in Docket No. 247,852. The remaining issues raised by claimant on appeal all apply to Docket No. 259,740. The ALJ found claimant had failed to prove any additional permanent impairment in Docket No. 259,740 and awarded only unauthorized medical. As enumerated by claimant in her petition for review, the issues are:

1. That Judge Sample erred in finding that claimant did not suffer a work disability as a result of injuries suffered by her in the course of her employment with respondent in claim 259,740;
2. That Judge Sample erred in finding that claimant is not totally and permanently disabled as a result of injuries suffered by her in the course of her employment with respondent in claim 259,740;
3. That Judge Sample erred in failing to award future medical benefits to claimant in claim 259,740;
4. That Judge Sample erred in denying payment of medical treatment expense incurred by claimant with Drs. Christiano and Harris and others in claim 259,740; and
5. That Judge Sample erred in holding that the decisions by Fortis, respondent's disability benefits administrator, and the Social Security Administration to award claimant long term disability benefits and total disability benefits "are wholly irrelevant" or "inconsequential and irrelevant" on the issue of whether claimant suffers work disability or permanent total disability in claim 259,740.
6. That Judge Sample abused her discretion in granting respondent repeated extensions amounting to several months within which to submit its case over claimant's objections; and
7. That Judge Sample erred in finding that claimant, "unilaterally quit her job." ¹

The Brief in Support of Claimant's Petition for Review added the following issues:

¹ Petition for Review (filed May 15, 2002).

Judge Sample erred in permitting respondent to "give evidence of the condition of [Mrs. Ayers] at the time [the Fevurly] examination was made." ²

Judge Sample abused her discretion in refusing to appoint a neutral physician. ³

Judge Sample erred in her calculation of the average weekly wage. ⁴

Respondent denies that claimant met with personal injury by accident arising out of and in the course of her employment in Docket No. 259,740. Accordingly, respondent denies claimant is entitled to an award of unauthorized medical expense for medical treatment in Docket No. 259,740, but otherwise agrees with the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The sole issue in Docket No. 247,852 concerns the determination of claimant's average weekly wage and, consequently, the appropriate compensation rate for the temporary total disability and permanent partial disability benefits awarded. The Board agrees with and adopts the ALJ's average weekly wage finding. Claimant returned to work for respondent and all her fringe benefits continued throughout the period of time temporary total and permanent partial disability compensation was payable. Accordingly, the ALJ was correct in not including the value of the additional compensation items in the calculation of claimant's average weekly wage.

The ALJ's Award in Docket No. 247,852 is affirmed in all respects.

Turning our attention now to the numerous issues raised in Docket No. 259,740, the Board notes that the ALJ's Award contains detailed findings of fact and conclusions of law. Those findings and conclusions need not be repeated herein. The Board adopts the ALJ's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the findings and conclusions expressed by the Board in this Order.

Claimant met with personal injury by accident arising out of and in the course of her employment by a series of accidents ending July 14, 2000. Claimant's injuries were a permanent aggravation of the injuries suffered in Docket No. 247,852 and resulted in additional permanent impairment and disability. The Board finds that claimant left work due to her work-related injuries and that respondent was unable to place claimant in a job that she had the physical ability to perform. Accordingly, respondent approved claimant's request for Family Medical and Leave Act (FMLA) leave and disability insurance benefits.

² Brief in Support of Claimant's Petition for Review at 8 (filed June 19, 2002).

³ *Id.* at 11.

⁴ *Id.* at 13.

The fact that claimant is receiving social security disability and private employer provided disability insurance benefits is not, in and of itself, proof that claimant is permanently and totally disabled due to her work-related injuries. The greater weight of the medical and vocational evidence is that although claimant is unable to do her former job duties with respondent, she is capable of engaging in other substantial and gainful employment.⁵ Accordingly, claimant fits the definition of a work disability, not a permanent total disability.

Although their task loss opinions are not expressed in the customary manner, the credible expert medical opinion testimony of Drs. Pamela Sue Harris and Peter J. Cristiano is that, as a result of her work-related injuries, claimant has lost the ability to perform 100 percent of the essential job functions and tasks she performed for respondent during the 15 years immediately preceding her July 14, 2000 accident.⁶ But claimant's work-related injuries have not rendered her completely unemployable. Nevertheless, following her injury, claimant failed to make a good faith effort to find appropriate employment. Therefore, her actual 100 percent wage loss cannot be utilized in determining her permanent partial disability. Instead, the wage loss prong of the work disability statute will be based upon claimant's ability to earn wages post-injury.⁷ The Board agrees with the ALJ that claimant retains the ability to earn between \$6 and \$7 per hour and that an appropriate wage to impute is \$6.50 per hour based upon a 40 hour work week. When this imputed average weekly wage earning ability of \$260 is compared to claimant's pre-injury average weekly wage of \$503.60, claimant's post-injury wage loss is 48 percent. When the 100 percent task loss is averaged with the 48 percent wage loss as required by K.S.A. 44-510e, claimant's work disability is 74 percent.

Claimant's average weekly wage is found to be \$503.60. This is arrived at by multiplying claimant's straight time hourly wage of \$12.59 times a 40 hour work week.⁸ Claimant failed to prove when her fringe benefits or items of additional compensation were discontinued, if ever. According, the value of those items are not included in the average weekly wage calculation.⁹

The Board finds the ALJ did not abuse her discretion in not appointing a neutral physician. The decision whether or not to make a referral to an independent health care

⁵ See K.S.A. 44-510c(a)(2).

⁶ See K.S.A. 44-510e(a).

⁷ See *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

⁸ See K.S.A. 44-511(a)(5) and (b)(4).

⁹ See K.S.A. 44-511(a)(2).

provider rests within the sound discretion of the ALJ.¹⁰ Likewise, she did not abuse her discretion in granting the extension of terminal dates.¹¹ In addition, the Board finds respondent failed to provide claimant with appropriate medical treatment after she was released by Dr. Bradley Storm. Accordingly, claimant is entitled to the payment of the reasonable and related medical treatment expenses she incurred with Drs. Cristiano and Harris.

Claimant is entitled to future medical benefits upon proper application to and order of the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Julie A.N. Sample dated May 13, 2002, is affirmed as to Docket No. 247,852 and Docket No. 259,740 is modified to award a 74 percent work disability as follows:

Wherefore, an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Helen Kay Ayers, and against the respondent Hallmark Cards, for an injury which occurred July 14, 2000, and based upon an average weekly wage of \$503.60 for 307.10 weeks of permanent partial compensation in the sum of \$335.75 per week or \$103,108.83 for a 74 percent permanent partial disability, making a total award not to exceed \$100,000.

As of October 3, 2003, there is due and owing claimant 168.57 weeks of permanent partial disability compensation at the rate of \$335.75 per week in the sum of \$56,597.38 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$43,402.62 is to be paid for 129.27 weeks at the rate of \$335.75 per week, until fully paid or further order of the Director.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

¹⁰ See K.S.A. 44-510e(a); K.S.A. 44-516.

¹¹ See K.S.A. 44-523(a) and (b).

Dated this _____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Kenneth Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director